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SUPREME COURT, U.S.

80-5049

IN THE SUPREME COURT OF THE UNITED STATES

October Term

1980

CLIFFORD E. CLAYTON,

Petitioner,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, and UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL NO. 509,

Respondents.

PETITION FOR WRIT OF CERTIORARI

to

UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

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to

UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES, AND TO THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

Petitioner, CLIFFORD E. CLAYTON, files this his Petition for Writ of Certiorari to review that portion of the judgment of the United States Court of Appeals for the Ninth Circuit which affirmed the judgment of the trial court in dismissing Petitioner's action against Respondents.

In support of the Petition, it is respectfully shown as follows:

OPINIONS BELOW

The opinion of the Court of Appeals has not been officially reported. It appears at 104 LRRM 2118. A copy of that opinion is attached as Appendix A. A copy of the Judgment and Findings of Fact and Conclusions of Law of the trial court is attached as

Appendix B.

STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

The judgment and order of the Court of Appeals is dated and was filed April 14, 1980.

There was no rehearing ordered. The court below initally entered its judgment and filed its opinion September 4, 1979. ITT-GILFILLAN filed a Petition for Rehearing and Suggestion for Rehearing en Banc on September 18, 1979, and Petitioner filed his Response thereto, pursuant to the Court's order, on October 16, 1979. On April 14, 1980, the Court of Appeals entered its order withdrawing its opinion of September 4, 1979, and filing a revised opinion and judgment. The Petition for Rehearing was denied and the Suggestion for Rehearing en Banc was rejected.

Jurisdiction to review the judgment of the Court of Appeals by writ of certiorari is conferred by 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

Whether in a Vaca v. Sipes type action by an employee against his former employer and his union alleging his discharge in violation of the collective agreement and unfair deprivation of his arbitral remedy under that agreement, where the employee has not resorted to his internal union remedy and the union has asserted that as an affirmative defense, and where the employee contends that remedy is inadequate as a matter of law,

(1) the union has satisfied its burden of proof on the affirmative defense by evidence showing an internal appeals procedure which, as a matter of law, cannot in any circumstances either effect the employee's

reinstatement or restore his grievance to the arbitration process;

(2) the union has satisfied its burden of proof on the affirmative defense by evidence which failed to show that the internal appeals procedure can and does provide relief within the period prescribed by 29 U.S.C. §411(a)(4);

(3) the considerations relied upon by the court below for imposing exhaustion of internal remedies as a mandatory prerequisite are inappropriate and contain a high potential for complicating the employee's judicial remedy by circuity of action, piecemeal litigation and inconsistent adjudication.

STATUTES AND REGULATIONS INVOLVED

Labor Management Relations Act of 1947, as amended, § 301; 29 U.S.C. §185(a) and (c):

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.
>
> * * * * *
>
> (c) For the purposes of actions and proceedings by or against labor organizations

in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

Labor Management Reporting and Disclosure Act of 1959, as amended, §101(a)(4); 29 U.S.C. §411(a)(4):

(4) No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: Provided, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: And provided further, That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or

petition. (Emphasis in original.)

Federal Rules of Civil Procedure, Rule 42(b):

> (b) The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counter-claims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.

STATEMENT OF THE CASE

This action was originally filed in the California Superior Court for Los Angeles County and removed to the United States District Court for the Central District of California. Jurisdiction is conferred upon that court by 29 U.S.C. §185 (a) and (c) and 28 U.S.C. §1331(a). This is a civil action wherein the amount in controversy, exclusive of interest and costs, exceeds $10,000.

Petitioner was discharged by his employer February 14, 1975, for reasons that do not appear in this record. He initiated this action Febrauary 5, 1976, against the employer, ITT-Gilfillan (hereafter "ITT") under Section 301 of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. §185, alleging the discharge to have been a breach of the collective agreement covering him, and against International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and Local No. 509 of the International (hereafter collectively "UAW"),

alleging breach by UAW of its duty fairly to represent him in failing and refusing to take to arbitration his discharge grievance.

Both ITT and UAW asserted as affirmative defenses Petitioner's failure to exhaust his internal union remedies. Petitioner contended that those remedies were inadequate as a matter of law and that the trial court should in its discretion not require his resort to or exhaustion of those remedies as a pre-condition to maintaining his action. Pursuant to Federal Rules of Civil Procedure, Rule 42(b), the trial judge ordered a separate trial on the issue of exhaustion as an issue potentially dispositive of the entire action.

After trial on that issue alone, the trial court determined that the internal remedies of the UAW, and in particular the appeal to its Public Review Board (hereafter "PRB"), were adequate to review and redress Petitioner's grievance and to grant a range of possible relief appropriate to his case. The Court found that Petitioner had failed to exhaust these remedies and dismissed his action against both ITT and UAW. Its judgment was entered May 19, 1977. Petitioner timely filed his notice of appeal to the Court of Appeals for the Ninth Circuit. By its judgment of April 14, 1980 that court affirmed the District Court's dismissal of the claim against UAW and reversed the dismissal of the claim against ITT. The case was remanded for trial on the issues of UAW's breach of its duty of fair representation and ITT's breach of the collective agreement.

Petitioner had been employed by ITT for over eight years and, since 1967, under a collective agreement between UAW and ITT which was in force at the time of his discharge. He timely filed a grievance in accordance with the provisions of that agreement. The grievance was duly processed through the three steps of the Grievance Procedure and a timely request for arbitration was

made. Thereafter, the International Representative servicing Local 509, and acting in its name, withdrew the request in a letter addressed to the Regional Office of the NLRB with which Petitioner had filed an unfair labor practice charge concerning his discharge. Petitioner's only notification of the dropping of his grievance was receipt of a copy of that letter.

The withdrawal of the request for arbitration effectively terminated Petitioner's grievance and finally closed to him the remedies available to him under the collective agreement. He took no steps to invoke the appeals procedure of UAW in relation to the latter's action.

The following briefly summarizes that procedure: In the case of an amalgamated local, such as Local 509, consisting of units each comprising a given employer's shop or premises, the first step in the appeals procedure is an appeal to the general membership meeting of the unit to which the aggrieved member belongs.

The next step is an appeal to the Amalgamated Local Union's delegate body or membership meeting. The third step is an appeal to the International Executive Board (hereinafter "IEB"). There are alternative courses of appeal from the IEB decision, to the Constitutional Convention Appeals Committee or to the PRB.

These provisions also require a member to exhaust all appeals before seeking redress from a civil court or governmental agency; UAW counsel, however, conceded at the trial that, by virtue of the Labor Management Reporting and Disclosure Act of 1959 (29 U.S.C. §411(a)(4)), the union's power to require exhaustion is limited to a maximum of four months.

The provisions of the UAW Constitution pertaining to the powers of the PRB are silent concerning the remedies it may order should it find the member's complaint justified. There were received in evidence two decisions of the PRB illustrating its

exercise of its powers. One shows that the PRB made a small award of back pay to an employee who did not wish to be reinstated to her former employment. The other shows an award of back pay to an employee who had been reinstated by his employer but who claimed he should have been permitted to return to work at an earlier date. It was stipulated at the trial that the PRB had, prior to Petitioner's discharge, awarded as a remedy to certain claimants invoking the procedures of the UAW Constitution, back pay for periods prior to the day of the PRB award. There is in evidence no decision addressing itself to the question of damages for future loss of earnings, whether as a substitute for reinstatement or otherwise. The record contains no policy statement emanating from the PRB, the UAW Convention Committee, the IEB or any other officer or body of the UAW, pertaining to the power of the appeals tribunals to award such prospective damages.

Under the collective bargaining agreement in effect at the time of Petitioner's discharge ITT's right to discharge employees covered by the contract was limited to instances of "just cause." A determination through the grievance procedure (including arbitration) that an employee was not discharged for just cause would result in his reinstatement without loss of seniority.

Seniority is defined as "the length of an employee's continuous service with the Company." Seniority applies to promotions, layoffs and recall rights, the right to replace a less senior employee in a lower paid job in case of layoff, shift transfers, bidding for jobs, vacations and sick pay. Benefits under the Pension Plan are directly keyed to length of service. The agreement also provides for automatic wage increases based on length of service and on annual rates negotiated by the UAW.

Other benefits incidental to employment under the collective bargaining contract include Group Insurance and Hospitalization,

paid holidays, bereavement pay upon the death of family members, and supplemental jury duty pay.

Petitioner was a shop steward from 1967 to his discharge in 1975. Shop stewards are elected, and as such they are entitled to seniority over all other employees in their respective areas of representation for purposes of layoff or transfer.

REASONS FOR ALLOWANCE OF THE WRIT

The statement of Questions Presented for Review, ante, sets forth important questions regarding the interpretation and application of federal labor law under §301 (29 U.S.C. §185), as declared in Vaca v. Sipes, 386 U.S. 171, 17 L.ed.2d 842 (1967), and Hines v. Anchor Motor Freight, Inc., 424 U.S. 544, 47 L.ed.2d 231 (1976), and by 29 U.S.C. §411 (a)(4). These questions deal with the circumstances in which an employee situated as described above can be denied his right to pursue Vaca v. Sipes relief. These questions also deal with the effectuation of the concern expressed in the above-cited cases for the individual worker who has to confront alone the bargaining process between collective parties far stronger than he, whose conflicting interests extend well beyond the merits of the employee's grievance. Argument supporting the importance of these questions and the need for their determination by this Court follows separately to each question.

Question 1. Whether, in the circumstances described above, the union has satisfied its burden of proof on the affirmative defense by evidence showing an internal appeals procedure which, as a matter of law, cannot in any circumstances either effect the employee's reinstatement or restore his grievance to the arbitration process.

On this issue, Petitioner's position is in the negative, because that remedy on its face and as a matter of law cannot

afford relief tantamount to his right under the collective agreement to reinstatement with full seniority and length-of-service related rights.

On this issue the circuits are divided. The Seventh Circuit has held that exhaustion of his internal union remedy is an inflexible prerequisiite to bringing the discharged employee's action against his union, whether or not the employee's claim was for relief beyond the power of the union to give. Baldini v. Auto Workers Local 1095, 581 F.2d 145 (C.A.7, 1978). Other circuits have held that resort to and exhaustion of the internal remedy is not a bar to the employee's action against the union where the union remedy is incapable of rendering the employee the full relief he would have been entitled to under the collective agreement. De Arroyo v. Sindicato Trabajadores, etc., 425 F.2d 281, 291 (C.A. 1 1970) -- the collective agreement remedy of reinstatement; Detroy v. American Guild of Variety Artists, 286 F.2d 75, 80 (C.A. 2 1961) -- where the union remedy was regarded as "dubious" in respect of an injury difficult to compensate for with a money award; Brady v. Trans World Airlines, 401 F.2d 87, 102 (C.A. 3 1968) -- the collective agreement remedy of reinstatement; Margetta v. Pam Pam Corp., 501 F.2d 179, 181 (C.A. 9 1974), and Fruit and Vegetable Packers v. Morley, 378 F.2d 728, 745 (C.A. 9 1969) -- the collective agreement remedy of reinstatement; -- Orphan v. Furnco Construction Corp., 466 F.2d 795, 801-802 (C.A. 7 1972) -- reinstating the employee's grievance to the grievance and arbitration processes of the collective agreement.

The court below actually aligned itself with the Seventh Circuit in Baldini, supra, and apparently abandoned its position developed in Margetta and Fruit and Vegetable Packers, supra. By reasoning that the union remedy was adequate here because all that petitioner could have gained against the union by judicial

action was money, the court below changed the standard from requiring that the union remedy be able to afford the contract remedy or its equivalent to merely noting that adequacy of the union remedy is to be measured only by what the union has the power to do. Such reasoning converts the inadequacy of the union remedy into the reason for requiring its exhaustion. It therefore makes exhausting the union remedy the same inflexible prerequisite to bringing the employee's action as did the Seventh Circuit in Baldini. The court below was mistaken in observing that "the courts can give no different relfef than that provided by the union." (Slip Opinion, p. 4, lines 12-14.) The court can award both money compensation and reinstatement, as has been clear since Vaca v. Sipes. It can do so with both the employer and the union before it, and thus can apportion its award both in accordance with the contribution of each to the employee's injury and with actual loss to the employee. As will be observed, post, without both parties before it the court may at the very least be unable to fashion its award so as to meet both of these objectives.

This is an issue which this Court has not resolved but should. Language concerning the employee's right to "equitable relief" in addition to monetary compensation, found in Vaca v. Sipes, 386 U.S. at 185-186, 17 L.ed.2d at 852, and Hines v. Anchor Motor Freight, Inc., 424 U.S. at 556, 47 L.ed.2d at 242-243, strongly indicates a resolution consistent with Petitioner's position here. But the division in the circuits shows the need for a decision that will afford guidance to trial courts and the bar.

Petitioner has contended throughout this litigation that the internal union remedy is inadequate to afford relief for an employee allegedly discharged in violation of the collective agreement. Under that agreement, a determination that an

employee's discharge was not for just cause would result in reinstatement without loss of seniority. UAW obviously has no legal right or power to order, through its Convention Appeals Committee or its PRB, that ITT reinstate Petitioner and restore his seniority and all its attendant rights. The UAW remedy is plainly no substitute for the arbitrator's power under the collective agreement; nor can that remedy restore Petitioner's grievance to the arbitral process under the collective agreement. ITT's obligation to arbitrate Petitioner's grievance under that agreement was exhausted when UAW dropped the grievance without arbitration. Plainly, UAW cannot compel ITT to agree to arbitrate it thereafter.

Moreover, a monetary award cannot compensate Petitioner for the loss of seniority and its attendant rights. Any job that has been held for a substantial period of time is unique, and the trial court so conceded. In the case of Petitioner, a black worker with all the disadvantages his race entails in the labor market,[1] this uniqueness has an especially intense quality. Petitioner had been employed by ITT for eight and one-half years. The seniority so built up entitled him to important benefits with respect to layoff, recall from layoff, length of vacation, and many other working conditions, all of which he lost. (See Statement of the Case, ante, pp. 8-9.) In addition, Petitioner also lost medical and hospitalization insurance for himself and

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1. U. S. Department of Labor Statistics show that the unemployment rate for black males averaged in 1975 nearly twice that of white males and thereafter has averaged considerally more than twice. In the first five months of 1980 the respective average rates were 10.2% and 4.7%. Employment and Earnings, U.S. Dept. of Labor, Vol. 22, No. 7, Vol. 24, No. 1, Vol. 25, No. 1, Vol. 26, No. 1, Vol. 27, No. 1, Vol. 27, No. 6.

his family, together with eight and one-half years of credited service under ITT's Pension Plan. He also lost the benefit of UAW representation in collective bargaining, which stands as an instrument for both extending his rights and privileges as an employee and defending those already gained. Because so many of these benefits turn upon Petitioner's length of service, they are unique and cannot be replaced through other employment. They can be provided only by ITT in the setting of its agreement with UAW.

Additionally, in his period of service Petitioner had developed a familiarity with the duties of his job, the procedures and routines of his employment, and the capacities and peculiarities of his co-workers and superiors, all of which undoubtedly made it possible for him to perform more satisfactorily and thus afforded some greater assurance of permanence in employment. He had developed associations and friendships with fellow employees. He had achieved a measure of recognition from them by reason of his having been selected and reelected as their shop steward beginning in 1967. All of these intangibles, taken together with the specific rights attendant upon his seniority under the UAW contract, make it clear that the trial court was right in saying that as to Petitioner, "there isn't anything like or equivalent to" his job at ITT.

Finally, a money award designed to compensate Petitioner for loss of this unique employment relation would be so speculative as to be unworkable and futile. For in these circumstances, the award would have to compensate him for not simply his lost earnings down to the time of the award. It would also be necessary to quantify his future losses over the balance of his work expectancy when he could no longer have the job security and other rights which his employment and length of service at ITT had earned for him. Note has already been made of the effect of seniority upon Petitioner's job security in cases of layoff and

right to recall when the work force is reconstituted. Similarly, reference has been made to the operation of length of service as a factor in promotion, wage increases, vacation, sick leave, lateral transfers. To determine Petitioner's loss from the deprivation of those rights and privileges entails comparing his expectable work history spent under the protection of the UAW-ITT agreement with his expectable work history in the employ of some other employer[s]. As to such substitute employment, there is no way of ascertaining whether it would be covered by any collective bargaining contract at all and, if it were, whether the terms of such contract would be different, and in what respects, from those of the contract here, especially as respects seniority protection in layoff, rehire, transfer, promotion, etc. One can be sure only that at a different employer, Petitioner's seniority from ITT would be unavailable and he would start at rung one of the seniority ladder.

In making such comparison, one would have to be able to predict with reasonable probability the frequency of Petitioner's foreseeable layoffs at ITT, given his eight and one-half years of seniority, and the likelihood and promptness of Petitioner's recall to employment after each such layoff. Similarly it would be necessary to predict a like employment history with a new employer and newly accumulated seniority. It is impossible to predict such events at all. They turn on matters over which the parties, and especially Petitioner, have no control; these matters include economic and technological developments and the vicissitudes of the business cycle, as well as the risks of

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business management, as to which proof is simply not available.[2]

In short, there is no competent evidence by which it could be shown what Petitioner's future earnings at I.T.T., under the protection of the UAW-I.T.T. contract, would be, as compared with his future earnings at some other place[s] of business with an unspecified seniority policy, if any.

It is the difference between these two that measures his damages. The two quantities cannot be ascertained with reasonable probability. Petitioner's damages from his discharge and loss of seniority are thus impossible to quantify.

Question 2. Whether the union in the circumstances described has satisfied its burden of proof on the affirmative defense by evidence which failed to show that the internal appeals procedure can and does provide relief within the period prescribed by 29 U.S.C. §411(a)(4).

On this issue Petitioner's position is in the negative because the statute, as interpreted and applied by this Court, merely gives the courts discretion to "stay their hand" for only four months. So read, the statute is not a grant of power to unions to require members to exhaust internal remedies, but a limitation on that power that allows them a brief period in which to consider the member's grievance. NLRB v. Ind. Union of Shipbuilders, 391 U.S. 418, 427, 20 L.ed.2d 706, 713 (1968).

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2. But it can be said that in the stage of erratic growth in the economy of the United States and the persistence of unemployment (particularly among blacks) since February 1975, when plaintfff was discharged, his seniority of eight and one-half years was of critical, if incalculable value. See, e.g., Economic Report of the President, January 1977, G.T.O. pp. 23-24; U. S. Department of Labor News (Bureau of Labor Statistics), published monthly from the period 1975 to date.

Petitioner submits that judicial discretion should not be exercised to require the employee to exhaust his internal remedy absent a showing that there is a reasonable likelihood that relief will be afforded within the four months period. Otherwise the exhaustion doctrine would be used to compel an idle act.

On this question there seems to be not only a conflict among the circuits but also within certain circuits. Those circuits which have applied the exhaustion of internal remedy principle to dismiss members' actions against their unions without express reference to the limitations of §411(a)(4) are: Baldini v. Auto Workers Local Union 1095, 581 F.2d 145 (C.A. 7 1978) -- the remedy sought was reinstatement to job with back pay; Fleming v. Chrysler, 575 F.2d 1187 (C.A. 6 1978) -- the remedy sought was back pay and restoration of seniority resulting from a discharge that had been remedied only by reinstatement; Brady v. Trans World Airlines, 401 F.2d 87, 104 (C.A. 3 1968) -- in that portion of the suit from which the member might have had remedy for the union alone for its conduct; Battle v. Clark Equipment Co., 579 F.2d 1338 (C.A. 7 1978) -- members sue for only money allegedly due under collective bargaining contract which the union had later amended by agreement with the employer; Imel v. Zohn, 481 F.2d 181 (C.A. 10 1973) -- cert. den. 415 U.S. 915, 39 L.ed.2d 469 -- after holding member had no excuse for failure to exhaust the internal remedy, the Court's footnote (p. 184, n. 7) states enigmatically, "Cf. exhaustion requirements in the Landrum Griffin Act, 29 U.S.C. §411"; Aldridge v. Ludwig-Honold Mfg. Co., 385 F. Supp. 695 (E.D. Pa. 1974) -- the member sought reinstatement to his job and the district court applied the exhaustion doctrine without reference to §411(a)(4) -- this decision was affirmed without opinion, 517 F.2d 1395 (C.A. 3 1975); cert. den. 424 U.S. 937 (1976).

There are eight circuits in which application of the

exhaustion doctrine has been qualified by the limitations prescribed in §411(a)(4). These include: Harris v. International Longshoremen's Assn., 321 F.2d 801, 804-805 (C.A. 3 1963) -- the member sought relief which the union could give; Semancik v. United Mine Workers of America, 466 F.2d 144, 151 (C.A. 3 1972) -- the member sought to enjoin the union's disciplinary proceedings [Harris and Semancik appear to be in conflict with Aldridge and Brady, supra; Wiglesworth v. Teamsters Local Union No. 592, 552 F.2d 1027, 1031-1032 (C.A. 4 1976) -- the member sought a remedy which the union could give, pertaining to conduct of union officers; Keene v. Int'l Union of Operating Engineers, 569 F.2d 1375, 1379 (C.A. 5 1978) -- the member sued the union under the so-called labor bill of rights; McCraw v. United Assn. of Journeymen, 341 F.2d 705 (C.A. 6 1965) -- member sought to enjoin union enforcement of a penalty, and member had not yet exhausted internal appeals procedure, but had carried same as far as he could at date suit filed; Buchholtz v. Swift & Co., 609 F.2d 317 (C.A. 8 1979), cert. den. 100 S.Ct. 672 -- action by member for money -- Court held exhaustion doctrine limited by §411(a)(4), but held against plaintiff on merits; Roth v. Int'l Brotherhood of Electrical Workers, 544 F.2d 1022, 1024 (C.A. 9 1976) -- member sued to prevent union from disciplining him for bringing suit against it -- the Court held that §411(a)(4) applied to all suits by members against their union; Operating Engineers Local Union No. 3 v. Burrough, 417 F.2d 370 (C.A. 9 1969), cert. den. 397 U.S. 916 -- action similar to that in Roth and same result [Roth and Operating Engineers appear to be in conflict with the case at bar wherein §411(a)(4) was not applied to the exhaustion requirement imposed upon Petitioner]; Winter v. Local Union No. 639, 569 F.2d 146 (D.C. Cir. 1977) -- action v. employer and union seeking money damages and injunction requiring union to process grievances non-discriminatorily -- in

determining application of exhaustion doctrine, Court applies §411(a)(4).

In holding that Petitioner should have exhausted his union remedy as a prerequisite to maintaining his action against the union, the court below appears to have ignored utterly §411(a)(4). It clearly did not limit the sweep of its holding by any application of that section or even any mention of it. Its reasoning that the union tribunal "would have elicited" the "reasons for the withdrawal of the arbitration request" (Slip Op., p. 4, lines 23-31) gives strong indication that the court contemplated a time period for exhaustion far in excess of four months. For the UAW Constitution gives no indication that the appeal will be determined within four months, or that, within such time period, there will emerge any findings of fact that could provide the court with the assistance it sought.

The UAW Constitution requires that a challenge to a local union's decision be made within 30 days, and the local union has 45 days thereafter in which to act. Appeal from adverse action by the local union, or its inaction, goes to the IEB. There is no time limit within which the IEB must act. Appeal lies to the PRB only after the IEB has rendered its decision, and there is no time limit within which the PRB must act. Likewise, appeals to the Convention and Issue Appeals Committee are taken only after IEB action; there is no time limit on the action of that Committee. There is thus no constitutional guarantee that the appeal procedure will eventuate in any correction within four months of the time that it is invoked, nor is there any protection against inordinate delay at the IEB and PRB levels.

The only other evidence shedding any light on the time within which the employee might get relief through the internal remedy consists of two opinions of the PRB. One of these was rendered four years, two months, and 20 days from the date of the local

union's action complained of. The other came down one year and three months after that date. In neither case had any self-correction emanated from the UAW appeals procedure within four months of the member's resort to it. From the evidence, then, it appears that the only fact finding in the appeals process is in the opinions of the PRB, and its decisions are not to be expected until long after the end of the four months period prescribed in §411(a)(4).

There are thus presented in the administration of the federal labor law grave policy considerations involving the protection of the individual in the collective process, and the likelihood that his economic exhaustion will long precede completion of the union appeals procedure. This Court has voiced concern over the potential for oppressive abuse in the unions' power to bar their members from access to courts through the internal remedy device. NLRB v. Shipbuilding Local 22, 391 U.S. 418, 426427, 20 L.ed.2d 706, 713-714 (1968). A District Judge has pointedly noted the problem. Dorn v. Meyers Parking Systems, 385 F.Supp. 779, 782-783 (E.D. Pa. 1975). This Court's recognition of the general problem of preserving the rights of the individual worker, where the union has exclusive powers as the collective bargaining representative, has been expressed in Vaca v. Sipes, 386 U.S. at 182, 17 L.ed.2d at 853, and in Hines v. Anchor Motor Freight, Inc., 424 U.S. at 56-565, 47 L.ed.2d at 241-242. The reduction through unemployment of the worker's already limited resources, his need to find work, the not remote chance that new work will take him to new areas and different employer-union situations, his inability to retain legal assistance are likely to lead to abandonment of his remedy in favor of more immediate and pressing needs, if not sheer inability to pursue them further.

Question 3. The considerations relied upon by the court below for imposing exhaustion of internal remedies as a mandatory

prerequisites are inappropriate and contain a high potential for complicating the employee's judicial remedy by circuity of action, piecemeal litigation and inconsistent adjudication.

The opinion below holding exhaustion to be mandatory rests upon four considerations: (a) Provisions of the union constitution forbidding members' suits against the union before all internal remedies are exhausted are contractual obligations upon the member which are "mandatory;" (b) The decision of the union appeals procedure would aid the court in determining the breach of the duty of fair representation aspect of the case; (c) The union remedy of mere money is not inadequate because Petitioner could at best have recovered only money from the union; and (d) Enforcing the exhaustion requirement would forestall "unnecessary interference" with union affairs.

None of these has merit and, taken together, they will lead to a circuity of action, piecemeal litigation and inconsistent determinations in those cases where the employee's relief must be obtained from both the employer and the union.

That the union constitution places an absolute bar upon suits against the union until the internal remedy has been exhausted is plainly a violation of 29 U.S.C. §411(a)(4). That statute forbids a union to require a member to exhaust the internal remedy beyond a period of four months before he sues the union. The union's constitutional provisions must be read in the light of §411(a)(4), McCraw v. United Assn. of Journeymen, 341 F.2d 705 (C.A. 6 1965), and are subordinate to its mandate, Richardson v. National P. O. Mail Handlers, 442 F.Supp. 188, 191 (ED Va. 1977).

The second consideration relies upon assumptions for which there is no factual basis in this record. There is nothing which informs as to whether at any stage of the union procedure (other than a PRB opinion, which could be expected years after the conduct complained of) there would be any factual analysis or

application of internal union "law" which could be of guidance to the Court. Nor is there anything concerning the nature of the appeals process from which the utility of any such determination could be evaluated. One cannot learn from this record how the issues are framed in such proceedings, how the record is adduced, or whether (other than a decision by the PRB) there are written decisions analyzing the evidence and the facts. There is nothing to indicate the fairness of the procedure, particularly whether the aggrieved employee has had a full opportunity to prepare and present his case that he was treated unfairly. There is, therefore, no basis in this record for assuming that the UAW procedure would generate anything useful in a judicial proceeding concerning the union's breach of its duty of fair representation.

This consideration also raises grave questions concerning the relationship in the judicial process between the union proceeding dealing with the employee's internal appeal and the judicial proceeding dealing with the employee's action against the employer. Would the issue of the union's breach of its duty of fair representation be litigated twice, both before the union tribunal, and before the Distrct Court? Or would the District Court "stay its hand" until it could receive guidance from the union tribunal's decision. If the latter, on the record here, the District Court would wait far longer than §411 (a)(4) permits. If the former, the employer would be placed under oppressive burdens and there would be a gross waste of judicial time. Further, there is a substantial risk that there would be inconsistent decisions, with consequent uncertainty as to the employee's rights.

The third consideration raises similar questions of judicial economy and inconsistency. That the union remedy affords all it is legally able does not dispose of its failure to afford the employee reinstatement. This limitation upon the union's remedy

simply points to the fact that to require the employee to exhaust it places on him the burden of litigating with the employer and with the union, separately but on the same facts, his right to reinstatement. This consideration presents the same consequence of duplicative litigation and inconsistent results already discussed.

The fourth consideration for the mandatory precondition presents a choice between competing policies. In the other side of the scale from avoiding unnecessary interference in union affairs are the concerns, voiced in Vaca and Hines, to protect the individual worker from oppression and injustice in a collective bargaining process between forces that are, in comparison with him, economic giants, as well as the need to avoid duplicative litigation, potentially inconsistent determinations, and burdensome delay violative of §411(a)(4). The balance would seem to be heavily on the side of the last enumerated concern.

The considerations guiding the exercise of judicial discretion in applying the exhaustion of internal remedy in the areas just covered need a more finely tuned articulation. The union constituion requirement of exhaustion should not be mandatory unless it gives substantial and reasonable promise (supported by a record of achievement) of a final and authoritative determination within the period prescribed in §411(a)(4). The union determination of the employee's claim should be considered by the Court only if the union procedures are fair on their face and provide for the employee's right to counsel of his choice, a defining of issues, opportunity for the employee to present his evidence and confront and cross-examine the witnesses and other evidence against him, and a written reasoned decision based upon the factual record. The District Court should in no case be bound by the determination of the

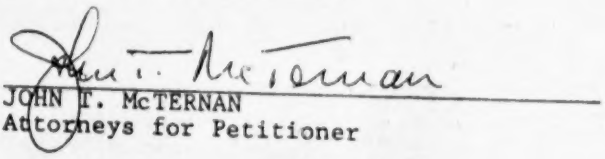
union tribunal but be free to determine the controversy in accordance with the standards applicable under the federal labor law developed under §301. The District Court should have the power to fashion the remedy applicable to employer and union, so as to assure neither overcompensation to the employee nor inadequacy of the final remedy.

Finally counsel have been authorized to voice to this Court the statement by the trial judge of his satisfaction that both ITT and Clayton were filing petitions for certiorari and his hope that this court would afford clarification on these "troublesome" questions.

CONCLUSION

For all of the reasons stated above, the petition for writ of certiorari should be granted.

Respectfully submitted,



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Attorneys for Petitioner

July 10, 1980.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLIFFORD E. CLAYTON, Appellee, vs. ITT GILFILLAN, etc., et al., Appellant.	)	No. 77-2756
CLIFFORD E. CLAYTON, Appellant, vs. ITT GILFILLAN, etc., et al., Appellee.	)	No. 77-2763 O R D E R

FILED

APR 14 1980

RICHARD H. DEANE
CLERK U.S. COURT OF APPEALS

Before: GOODWIN and KENNEDY, Circuit Judges, and TAYLOR,* District Judge

The opinion filed herein on September 4, 1979, is withdrawn and the clerk is directed to file the attached revised opinion.

With the filing of the revised opinion, the panel votes to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing and of the panel's revised opinion, and no judge has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b) and G.O. 5.3.

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

*The Honorable Fred M. Taylor, United States District Judge for the District of Idaho, sitting by designation.

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RICHARD H. DEANE
CLERK U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLIFFORD E. CLAYTON, Appellee, v. ITT GILFILLAN, etc., et al., Appellant.	No. 77-2756
CLIFFORD E. CLAYTON, Appellant, v. ITT GILFILLAN, etc., et al., Appellee.	No. 77-2763 REVISED OPINION

Appeal from the United States District Court
for the Central District of California
Irving Hill, Chief Judge, Presiding
Argued and submitted April 4, 1979
Opinion filed September 4, 1979

Before: GOODWIN and KENNEDY, Circuit Judges,
and TAYLOR*, District Judge.

GOODWIN, Circuit Judge:

Clayton, a discharged employee, appeals from a district court judgment dismissing his action against ITT-Gilfillan for wrongful discharge under section 301 of the Labor Management Relations Act (29 U.S.C. § 185) and against his union for breach of its duty to represent him. We affirm the dismissal in favor of the union, but reverse the judgment in favor of the employer.[1]

For alleged misconduct not material here, ITT fired Clayton in February 1975. As a member of the United Auto

*The Honorable Fred M. Taylor, United States District Judge for the District of Idaho, sitting by designation.

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Workers (UAW), Clayton was entitled under a collective bargaining agreement to seek reinstatement. He took the first step under the contract, a formal request for reinstatement, but the company denied his request. Clayton's local union then filed a timely grievance, but again the company refused to reinstate him. The union representative next made timely demand under the terms of the collective bargaining agreement for arbitration of the grievance. For reasons not stated in the record, however, the union eventually withdrew the request for arbitration.

Clayton was notified of the local official's decision not to press for arbitration. Under Article 33 of the union constitution, a member who is not satisfied with the handling of his grievance may appeal to the local's delegate body or general membership meeting. Appeal from either group's decision may next be taken to the International Executive Board. The unsatisfied member may then appeal the Board's decision to the Constitutional Convention Appeals Committee, or in some cases to the Public Review Board (PRB) established in Article 32 of the union's constitution.

Article 33, section 12, of the union constitution requires any member who feels aggrieved by any action of the local to exhaust his constitutional remedy before appealing to a civil court or governmental agency for redress.

Clayton admits that he did not exhaust his union remedies. He did not appeal the union official's decision not to proceed to arbitration even to the first appellate level provided in Article 33. Instead, he brought this action in federal district court several months later.

Both the union and ITT asserted as affirmative defenses Clayton's failure to exhaust his union remedies. under Fed. R. Civ. P. 42. The court found that (1) Clayton had failed to exhaust his remedies, (2) the remedies available to Clayton through the union appeals process were adequate to redress his grievance, and (3) exhaustion of internal remedies could not be excused as futile. As a matter of law, therefore, the district court held that Clayton could not maintain an action against either defendant.

1. The union's exhaustion defense.

The exhaustion of internal remedies as a condition of maintaining an action against the union is a matter of judicial discretion.[2] Buzzard v. Local Lodge 1040, 480 F.2d 35, 41 (9th Cir. 1973); Keeffe Brothers v. Teamsters Local No. 592, 562 F.2d 298, 302-03 (4th Cir. 1977) (citing cases). Relying principally on Buzzard and Newgent v. Modine Manufacturing Co., 495 F.2d 919 (7th Cir. 1974), the district court held that Clayton's failure to exhaust his union remedies as required by the union constitution prevented him from suing the union. We agree.

There is no question that Article 32, section 12, of the union constitution made exhaustion mandatory here. Exhaustion is excused only if the remedies available are inadequate or if resort to the internal procedures would be futile. Buzzard v. Local Lodge 1040, supra, 480 F.2d at 41; Baldini v. Local No. 1095, 581 F.2d 145, 149 (7th Cir. 1978).

Clayton contends that the internal appeals process was inadequate because the union could not reinstate him to his job. The union could "only" award him money for any wrong it had caused, he complains.

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Many courts examining the same internal remedies as those provided to Clayton have found them fair and adequate. See Baldini v. Local No. 1095, 581 F.2d at 149 (citing cases). In Baldini, the Seventh Circuit upheld the UAW procedures against an objection identical to that raised by Clayton. The ability to award only money damages does not make the process inadequate; relief against the union in the civil action Clayton now brings would give him no more. A primary reason for requiring exhaustion is to forestall unnecessary interference with union affairs. Brady v. Trans World Airlines, Inc., 401 F.2d 87, 104 (3d Cir. 1968), cert. denied, 393 U.S. 1048 (1969). It follows that exhaustion makes especially good sense when the courts can give no different relief than that provided by the union.

More important in this case is the aid that exhaustion would have furnished the courts in deciding Clayton's claim against the union.

> "A primary reason for the existence of the exhaustion doctrine is that prior union action interpreting union rules and perhaps also further refining and defining the problem may well assist the court when it is later called upon to resolve the controversy." Buzzard v. Local Lodge 1040, 480 F.2d at 41.

The UAW's liability (if any) for breach of its duty of fair representation would depend on the reasons for the union's withdrawal of the arbitration request. There is little in the record to indicate why the local official changed his mind and withdrew the arbitration request. But the missing motive is precisely the sort of information that an appellate body within the union would have elicited, compiling a record that would greatly assist the court now.[3]

For all these reasons, the district court acted well within its discretion when it dismissed Clayton's claim against the union for failure to exhaust. Clayton failed to give his union the opportunity to reverse itself. He cannot obtain by judgment now what he would not allow the union an opportunity to afford him under its constitution.

2. Claim against the employer.

We next consider whether, as the district court held, Clayton's failure to exhaust internal union remedies barred his action against his employer for wrongful discharge. This circuit has discussed the validity of the employer's asserted exhaustion defense in dictum, but it has never directly decided the issue.[4] We now find that if a claimant, by exhausting internal union remedies, could not obtain the same relief sought in a civil action against an employer, the employer may not raise the failure to exhaust internal remedies as a defense.

While exhaustion of union remedies is not a condition precedent to maintaining an action against an employer, the employer is protected to a substantial degree by the exclusivity of the collective bargaining agreement's arbitration remedy. Exhaustion of the remedies provided in the agreement is required prior to a breach-of-contract action when those remedies are exclusive. Vaca v. Sipes, 386 U.S. 171, 184 (1967).[5] Remedies are presumed to be exclusive where, as here, the parties to the agreement do not expressly provide that the grievance and arbitration procedures are not the exclusive remedy. Republic Steel Corp. v. Maddox, 379 U.S. 650, 657-58 (1965).

The requirement of exhaustion of collective bargaining remedies may thus bar an employee's action against an

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employer. Otero v. Electrical, Radio and Machine Workers, 474 F.2d 3 (9th Cir. 1973). It is typically the employee's union, however, and not the employee himself that controls initiation of arbitration or other remedies. Therefore, an exception to the exhaustion doctrine is recognized. Where, as here, the union has sole power to invoke arbitration, the employee can obtain judicial relief for breach of the employment contract only if he first shows that the union wrongfully refused to seek arbitration. Vaca v. Sipes, 386 U.S. at 185. See also Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976); Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971); Beriault v. Local 40, 501 F.2d 258 (9th Cir. 1974). To be wrongful, however, the failure must be "arbitrary, discriminatory, or in bad faith." Vaca v. Sipes, 386 U.S. at 190.

The instant case differs from Vaca and Hines, the leading cases in this area. The employee's failure to exhaust against the union was not an issue in those cases. In both, the discharged employee faced no exhaustion barrier to union liability for failure to represent him. Here, ITT contends that Clayton's failure to exhaust his intraunion remedies precluded a showing that the UAW's failure to prosecute his grievance was "wrongful," barring his action for wrongful discharge.

It is initially useful, in determining the applicability of an exhaustion defense in this context, to distinguish two types of exhaustion requirements and the policies underlying each. The first, discussed above, requires union members to pursue all remedies under a union's constitution and bylaws before bringing actions against the union. As noted, this exhaustion requirement

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prevents unnecessary judicial interference in union disputes and conserves judicial resources.

The second type of exhaustion requirement compels unions or individual employees to follow all grievance procedures under a collective bargaining agreement before resorting to judicial remedies against employers. Exhaustion under the collective bargaining agreement prevents parties to the agreement from "short-circuiting" an agreed upon grievance procedure by resort to the courts. This is consistent with the policy preference, declared in section 203 of the Taft-Hartley Act, that, if at all possible, labor disputes should be resolved within the framework of procedures approved under collective bargaining, rather than in the courts. 29 U.S.C. § 173(d). This primary commitment to private dispute resolution has been emphasized in a series of landmark Supreme Court labor decisions. See, e.g., Hines v. Anchor Motor Freight, Inc., supra; Vaca v. Sipes, supra; Republic Steel Corp. v. Maddox, supra.

There are good reasons, then, for requiring union members to exhaust procedures under union constitutions or bylaws before bringing actions against unions and for compelling employees to fully pursue collective bargaining remedies before bringing judicial action against employers. But are there good reasons for transferring the intraunion exhaustion requirement from the union member versus union context to cases in which employees sue employers for wrongful discharge?

In support of this extension, ITT argues that if an employee does not exhaust internal union remedies, he or she is estopped from showing that the union acted

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"wrongfully," as is required by Vaca and Hines. The company claims that if Clayton had pursued his internal remedies after the union had declined to process his grievance, the UAW might have reversed itself and the Vaca-Hines union "wrongfulness" standard would not have been satisfied. This argument was most cogently described in Brookins v. Chrysler Corp, 381 F Supp. 563, 568-69 (E.D. Mich. 1974):

> "By exhausting his internal remedies the employee may be able to eliminate the very wrong of which he complains, not merely obtain a remedy therefor in another forum. If the union's wrongful refusal to continue the grievance were reversed without prejudice to his rights, the employee would no longer have a cause of action for breach of the duty of fair representation, and consequently would have no right under Vaca to sue his employer for breach of contract." 381 F.Supp. at 569.

We find this analysis persuasive. But it does not apply in instances when the employee, by exhausting intraunion remedies, would not "be able to elimimate the very wrong of which he [or she] complains." That is the case here.

The rationale for requiring a showing of "wrongful" conduct in the Vaca-Hines context, as noted, is to prevent the circumvention of collectively bargained grievance procedures. A party should be barred from seeking in court what might still be obtained through private contractual remedies. Allowing the employer to raise intraunion exhaustion as a defense, if exhaustion could have resulted in a claimant obtaining the same relief he or she seeks in a civil action, promotes private dispute resolution.[6] Accordingly, the employer's exhaustion defense is properly recognized in those circumstances.

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If, however, an aggrieved party cannot obtain adequate relief through contractual or internal grievance procedures, the dispute resolution rationale is inapplicable. There is no reason, consistent with Vaca, Hines, et al., to require exhaustion if, regardless of the outcome of a full grievance procedure, a claimant will be compelled to resort to judicial process.

Here, once the union withdrew its petition for a hearing on his grievance, Clayton lost any opportunity he might have had for reinstatement through the contractual grievance process. Even if Clayton had successfully appealed the withdrawal of the hearing request and the union had reversed itself and found that it should have processed his grievance, the union's public review board could do no more than award him damages for breach of its duty of fair representation. It could neither reinstate Clayton nor reinstate his petition and prosecute his grievance action. We conclude that Clayton's claim against ITT was not barred by failure to exhaust such insufficient remedies. See Winter v. Local 639, Int'l Brotherhood of Teamsters, 569 F.2d 146, 150-51 (D.C. Cir. 1977); Harrison v. Chrysler Corp., supra. Accord, Margetta v. Pam Pam Corporation , 501 F.2d 179, 180 (9th Cir. 1974); Fruit & Vegetable Packers, Local 760 v. Morley, 378 F.2d 739, 745 (9th Cir. 1967).

Conditioning the employer's use of the internal exhaustion defense on the adequacy of internal union remedies produces an anomaly. Where the employer raises the affirmative defense of failure to exhaust the contract's dispute resolution machinery, and where the employee has failed to exhaust internal union procedures, the employer will be required to defend the union's representation of its

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members. In an action from which the union has been dismissed, ITT, to prevail on its affirmative defense, must defend the UAW's good faith in declining to prosecute Clayton's grievance.

We are aware of the anomaly. But we have not been directed to any authority that would permit the employer to escape liability if the trier eventually finds that the employee did not receive the minimum representation his union owed him. On the contrary, the cases compel the result we reach.

In Vaca, the Supreme Court said that the union's wrongful refusal to process a grievance could not defeat the employee's right to judicial relief against the employer, even though "the employer in such a situation may have done nothing to prevent exhaustion of the exclusive contractual remedies to which he agreed in the collective bargaining agreement." 386 U.S. at 185. This means that the protection afforded to an employer by the collective bargaining agreement is conditional on the union's discharge of its duty to represent an employee fairly. Hines v. Anchor Motor Freight, Inc., 424 U.S. at 571. The Court recognized that this in turn means courts will have to pass on whether there has been a breach of the duty of fair representation in actions for breach of the employment contract. Vaca v. Sipes, 386 U.S. at 187.[7] To hold here that Clayton has no cause of action against ITT because of his union's failure to proceed to arbitration would run counter to the basic principles of Vaca and Hines.

We must therefore remand this case. ITT will be liable only if (a) the union's withdrawal of its demand for arbitration was wrongful, as that term has been construed in

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Vaca, Hines, and other cases, and (b) Clayton's discharge was a breach of contract. See Hines v. Anchor Motor Freight, Inc., 424 U.S. at 570-71.[8]

We note also that, although the union will incur no liability because of Clayton's failure to exhaust internal remedies, the extent of the union's wrong (if any) can affect the relief granted against ITT.

> "If a breach of duty by the union and a breach of contract by the employer are proven, the court must fashion an appropriate remedy. Presumably, at least in some cases, the union's breach of duty will have enhanced or contributed to the employee's injury. * * * The governing principle, then, is to apportion liability * * * according to the damage caused by the fault of each." Vaca v. Sipes, 386 U.S. at 187, 197.

See also Hines v. Anchor Motor Freight, Inc., 424 U.S. at 572-73 (Stewart, J., concurring). Hampered as we are by the lack of information about why the union dropped its arbitration demand, we can offer no better advice to the district court on remand.

Reversed and remanded for trial on the claim against the employer only. The judgment dismissing the claim against the union is affirmed.

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FOOTNOTES:

[1] Defendant ITT also cross-appeals from the district court's refusal to strike plaintiff's prayer for attorney's fees, punitive damages and damages for emotional distress. This was neither a final judgment under 28 U.S.C. § 1291 nor an interlocutory order appealable under 28 U.S.C. § 1292. It is therefore not reviewable at this time.

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[2] Some courts have found that the duty of a union to represent its members arises from tort or contract law, but we have held that the duty of fair representation is a matter of federal statute. Price v. Southern Pacific Transportation Co., 586 F.2d 750, 753 (9th Cir. 1978); see also Retana v. Apartment, Motel and Hotel Elevator Operators, Local No. 14, 453 F.2d 1018, 1021-22 (9th Cir. 1972). Judicial discretion to require exhaustion derives from 29 U.S.C. § 411(a)(4), which says:

> "No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency * * * : Provided, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof * * * ." (Emphasis added.)

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[3] The policies warranting a requirement of exhaustion of intraunion remedies in suits between union members and unions or union officers were succinctly described in Simpson & Berwick, "Exhaustion and the Individual Employee," 51 Tex. L. Rev. 1179 (1973):

> "Conservation of judicial rescources was one policy underpinning the doctrine. Also, courts agreed that administrative filtration served to sharpen grievances for eventual judicial resolution, assisting judges faced with unfamiliar rules and practices. Moreover, requiring resort to internal private remedies was thought to stimulate unincorporated associations to establish honest, democratic grievance procedures. Finally, some courts feared that a contrary rule would encourage a flood of litigation, sapping the effectiveness of internal procedures." Id. at 1216-17.

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[4] In Retna V. Apartment, Motel and Hotel Elevator Operators, Local No. 14, 453 F.2d 1018 (9th Cir. 1972), the court explicitly stated that an employer could not raise the intraunion exhaustion defense, but this statement is included in a footnote which ITT properly chracterizes as "dictum." Id. at 1027 n. 16. See Winter v. Local No. 639, Int'l Brotherhood of Teamsters, 569 F.2d 146, 150 n. 22 (D.C. Cir. 1977), and Simpson & Berwick, supra, note 3, at 1223, n. 212, (both referring to Retana footnote 16 as "dictum"). It should be noted, however, that Retana footnote 16 has been cited by other courts for the proposition that an employer cannot raise the intra-union exhaustion defense. See Fitzer v. Safeway Stores, 586 F.2d 182, 184 (10th Cir. 1978); Harrison v. Chrysler Corp., 558 F.2d 1273, 1278 (7th Cir 1977).

We also note that in Kepard v. International Harvester Co., 581 F.2d 764 (9th Cir. 1978), our court affirmed the dismissal of an employee's claim against his union because he had failed to exhaust his intraunion remedies, but reached the merits of the employee's claim against his employer for back pay. There is no indication, however, that the company attempted to raise Keppard's failure to exhaust as a defense. The opinion does not refer to, much less reject, any reliance by the employer on an internal exhaustion defense.

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[5] Most of those parts of Vaca v. Sipes concerning employee section 301 actions for wrongful discharge are dicta. See 386 U.S. at 199-202 (Fortas, J., concurring). The holding in Vaca concerned only the federal courts' jurisdiction of employee causes of action against a union for failure to represent. But we have indicated that we agree with Vaca's discussions relating to claims against an employer. Margetta v. Pam Pam Corp., 501 F.2d 179, 180 (9th Cir. 1974).

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[6] The Seventh Circuit recognized and thoughtfully described the reasons for allowing the employers to raise a qualified intraunion exhaustion defense in Harrison v. Chrysler Corp, 558 F.2d 1273 (7th Cir. 1977):

> We are not persuaded, however, that exhaustion of intraunion remedies is never a

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legitimate concern of the employer. In Orphan v. Furnco Construction Corp., supra at 801, we gave serious consideration to an employer's argument that permitting it to raise the defense would facilitate the national labor policy in favor of the private adjustment of grievances. That argument has some merit. Under certain circumstances an employee's appeal within the union, after a union official's bad faith refusal to press his grievance, might place the grievance procedure back on its proper course. A rule requiring such action would directly and substantially benefit the employer by enabling it to rely on the integrity of the grievance procedure in all cases in which it has not been irretrievably spoiled by the union's unfair representation.

"The question presented is whether the employee owes an obligation to the employer to exhaust available methods of reviving a stalled grievance procedure before abandoning that procedure and resorting to the courts for relief. We believe such an obligation is implied under a collective bargaining agreement which, like the one in this case, reposes in the union exclusive authority to represent the employee in contractual claims against the employer and which provides grievance machinery as the exclusive method of resolving those claims. It is clear that such provisions may not preclude the employee from seeking judicial relief independently if the union irreversibly defaults on its obligation to represent him fairly. Hines v Anchor. Motor Freight, Inc., supra at 567, 96 S.Ct. 1048. However, no valid reason appears for relieving the employee from the operation of these provisions, requiring his reliance on the union for representation and the grievance procedure for relief, so long as the procedure remains viable and fair representation can be obtained. Intraunion appellate procedures may be a method by which fair representation may be regained and the grievance procedure revived. The employer may properly assert that the employee has an obligation under the collective bargaining agreement to resort to intraunion appellate procedures for this limited purpose. To raise this defense, however, the employer must establish that an intraunion appeal could result in reversal of the union's refusal to press the grievance and that the grievance could be reinstated in accordance with the provisions of the collective bargaining agreement. Orphan v. Furnco Construction Corp., supra at 801. Moreover, even where such an opportunity exists, the employee may be relieved of the exhaustion requirement where resort to the intraunion appellate procedures would be futile. Id. at 802." Id. at 1278-79

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[7] The necessity of reviewing the union's activities in trying a claim against the employer was a main reason for Mr. Justice Black's dissent in Vaca. "Henceforth, in almost every § 301 breach-of-contract suit by an employee against an employer, the employee will have the additional burden of proving that the union acted arbitrarily or in bad faith." 386 U.S. at 210.

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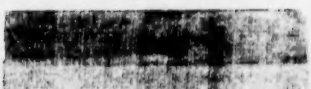
[8] The Sixth Circuit reaches the same conclusion in a similar situation. In Smart v. Ellis Trucking Co., Inc., 580 F.2d 215 (6th Cir. 1978), a discharged employee brought an action against his union for breach of the duty of fair representation, against his former employer for wrongful discharge under section 301, and against both for conspiracy. The conspiracy and unfair representation claims were barred by the statute of limitations. This left the section 301 claims against the employer. The court noted that the company could only be liable if the employee showed that the union had acted wrongfully under the test of Hines as a prerequisite to his section 301 claim. The company would therefore defend on the basis of union conduct when the statute of limitations guaranteed the nonappearance of the union as a party. But dismissal of the claims against the union was held irrelevant to the employee's ability to proceed against the employer. 580 F.2d at 218-19.

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APPENDIX B

Judgment and Findings of Fact and Conclusions of Law



Attorneys for Defendants

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CLIFFORD E. CLAYTON, Plaintiff, -vs- ITT GILFILLAN, A Division of International Telephone and Telegraph Corporation, a Corporation; INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, an unincorporated labor organization; UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL UNION NO. 509, an unincorporated labor organization, Defendants.	CIVIL NO. 76-0730-IH PROPOSED JUDGMENT

The above-entitled matter having come on for trial before this Court on May 3, 4, and 5, 1977, Plaintiff CLIFFORD E. CLAYTON, being Represented by John McTernan of Margolis, McTernan, Scope and Sacks, Defendant Unions' being represented by Matthew B.F. Biren and Lawrence Rosenzweig of Levy, Kosadin, Goldschmid and Sroloff, Defendant ITT Gilfillan being represented by Everett F. Meiners and Kenneth J. Florence of Parker, Milliken, Clark and O'Hara, and

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the Court having considered all the testimony and documentary exhibits, as well as oral argument, and having made Findings of Fact and Conclusions of Law.

IT IS HEREBY ADJUDGED AND DECREED that judgment shall be entered in favor of Defendant UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW and its affiliated LOCAL 509 and Defendant ITT GILFILLAN and Defendants shall be awarded costs of suit.

DATED: MAY 27, 1977

UNITED STATES DISTRICT JUDGE

PROOF OF SERVICE

I am a citizen of the United States, over the age of 18 years, residing or employed in the County of Los Angeles, and not a party to the within action; my business address is:

3550 Wilshire Boulevard, Suite 1020, Los Angeles, CA. 90010

On May 13, 1977, I served a true copy of the attached:

PROPOSED JUDGMENT

on the Plaintiff in said action, by hand delivering a true copy thereof enclosed in a sealed envelope addressed as follows:

John McTernan, Esq.
Margolis, McTernan, Scope & Sacks
3600 Wilshire Boulevard, Suite 2200
Los Angeles, California 90010

Everett J. Meinerz, Esq.
PARKER, MILLIKEN, CLARK & O'HARA
27th Floor-Security Pacific Plaza
333 South Hope Street
Los Angeles, California 90071

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on May 13, 1977 at Los Angeles, California.

JAY TWERT

(SPACE BELOW FOR FILING STAMP ONLY)

LEVY, KOSZDIN, GOLDSCHMID & SROLOFF
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
SUITE 1020
3550 WILSHIRE BOULEVARD
LOS ANGELES, CALIFORNIA 90010
(213) 380-3140

Attorneys for Defendants

FILED
MAY 27 1977
CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CLIFFORD E. CLAYTON, Plaintiff, -vs- ITT GILFILLAN, A Division of International Telephone and Telegraph Corporation, a corporation; INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, an unincorporated labor organization; UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL UNION NO. 509, an unincorporated labor organization, Defendants.	CIVIL NO. 76-0730-IH FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come on for trial on May 3, 4, and 5, 1977, the Court, having considered the testimony, exhibits, and oral argument, makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Plaintiff, CLIFFORD E. CLAYTON was, prior to his discharge in February, 1975 an employee of Defendant ITT GILFILLAN

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and a member of Defendant INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, (hereafter referred to as "International Union"), and UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL UNION NO. 509 (hereafter referred to as "Local 509").

2. Defendants ITT Gilfillan, International Union, and Local 509 were signatory to a collective bargaining agreement which governed the terms and conditions of Plaintiff's employment at ITT Gilfillan and said collective bargaining agreement was in full force and effect during the period from March 1, 1973 through February 29, 1976.

3. Plaintiff was a member in good standing of Local 509 and the International Union at all times material hereto.

4. In February, 1975, Plaintiff was discharged by Defendant ITT Gilfillan for violation of Company Rule 5 which prohibits lewd, indecent and immoral behavior on said Defendant's premises.

5. In response to said discharge, Plaintiff timely filed a grievance in accordance with the grievance procedure contained in the collective bargaining agreement.

6. After processing the grievance through Step III of the grievance procedure, Ralph Gazzigli, ~~acting in his capacity as~~ the INTERNATIONAL Representative ~~of the International Union~~ servicing Defendant Local 509, IN HIS CAPACITY AS REPRESENTATIVE OF LOCAL 509, timely requested arbitration of Plaintiff's grievance. Subsequently, Mr. Gazzigli decided, ~~with the advice and consent of the officers of Local 509 and the International Union,~~ that the request for arbitration should be withdrawn. Plaintiff was notified of this decision by REPRESENTING A CITY OF a letter dated July 11, 1975 (Pl. Ex. 3)

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7. Articles 32 and 33 of the Constitution of the International Union provide internal union remedies for members of the International Union who are aggrieved by actions of a local union or the international union or any representatives thereof. The procedures provided by Articles 32 and 33 of the International Constitution are incorporated into Article VI of the By-Laws of Defendant Local 509. It was stipulated at trial that Plaintiff failed to initiate, let alone exhaust the internal union remedies provided in the International Constitution and the By-Laws of Local 509. More specifically, Plaintiff failed to take the following steps:

(a) Plaintiff failed to appeal the refusal to arbitrate his case to the membership of Local 509 as required by Article 33, Section 3 of the Constitution of the International Union.

(b) Plaintiff failed to appeal to the Public Review Board and/or International Executive Board as provided by Articles 32 and 33 of the Constitution of the International Union and by Article VI of the By-Laws of Defendant Local 509.

8. All the procedures mentioned in finding No. 7, supra, were available to Plaintiff. The Constitution of the International Union reasonably advised Plaintiff about his intra-union appeal rights. Moreover, Plaintiff was specifically advised about his intra-union rights by Bob Laster, President of Local 509. Mr. Laster specifically advised Plaintiff about Articles 32 and 33 of the International Constitution and about the rights of appeal to the Public Review Board.

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9. In addition, the International Union mailed Plaintiff copies of Solidarity, the official newspaper of the International Union, which advised Plaintiff and other members of the availability of the intra-union remedies. The Articles from Solidarity included a solicitation for members to telephone the Public Review Board if they had any questions about its operations or how to initiate the procedures of the Public Review Board. The address to which the copies of Solidarity were sent since August, 1974 was Plaintiff's correct address. Upon occasion, Plaintiff read Articles from Solidarity, but, at other times, he did not bother to read the copies of Solidarity which he received.

10. Plaintiff had become familiar with the intra-union appeal procedures because he had previously seen and participated in an appeal made to the Local 509 Membership by one of its members.

11. Plaintiff was uniquely sensitive to his legal rights and pursued them in numerous ways, including the following:

(a) Plaintiff filed a charge with the National Labor Relations Board with respect to his discharge.

(b) Plaintiff also filed charges with the Equal Employment Opportunity Commission and the Fair Employment Practices Commission of the State of California with respect to his discharge.

(c) Plaintiff filed a claim for unemployment benefits with the State of California. When his claim for benefits were initially denied, Plaintiff requested a hearing and ultimately prevailed in said hearing. The hearings regarding Plaintiff's unemployment benefits occurred in the months of July and August, 1975.

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12. Plaintiff was represented by counsel during his unemployment benefit hearings. The unemployment hearings took place during the time within which Plaintiff was required by Articles 32 and 33 of the International Constitution to initiate the internal union appeal procedures. Plaintiff sought advice from his counsel regarding his rights against Defendants. Plaintiff was advised by counsel to seek other counsel for further guidance in these matters.

13. At all times material hereto, the Public Review Board had the power to grant a range of possible relief, including the award of monetary damages, which would be appropriate and adequate in the instant case.

14. No evidence was presented at time of trial which indicated that the pursuit of the intra-union remedies by Plaintiff would have been futile for any reason. More specifically, no evidence was presented which indicated that there would have been a preordained negative result if Plaintiff had pursued the intra-union remedies.

15. All Findings of Fact set forth under the heading "Conclusions of Law" are hereby incorporated by reference herein.

CONCLUSIONS OF LAW

1. All Conclusions of Law appearing under the heading "Findings of Fact" are hereby incorporated by reference.

2. This Court has jurisdiction over the subject matter of the instant case pursuant to 28 U.S.C. §1337 and 29 U.S.C. §185 (a).

3. The exhaustion of internal union remedies is a prerequisite to the initiation of a lawsuit by a Union member who

feels aggrieved by the actions of his Union. Section 101(a)(4) of the Labor Management Reporting and Disclosure Act of 1959, (29 U.S.C. §411(a)(4)). Moreover, the Courts have enunciated the public policy that a union member may not sue his union if he has bypassed union remedies through which a union member may obtain an impartial examination of his dispute with the union. See, e.g., Buzzard vs. Local Lodge 1040, 480 F.2d 35 (9th. Cir. 1973)

4. Article 33 of the Constitution of the International Union embodies the above-mentioned public policy and imposes it on members of the International Union. The procedures contained in Article 33 of the Constitution are incorporated in the By-Laws of Local 509. Article 33, Section 12 of the International Constitution requires invocation of the internal union appeal procedures before a member resorts to a civil court or governmental agency for redress.

5. The intra-union remedies provided in Articles 32 and 33 of the Constitution of the International Union and the By-Laws of Local 509 provide an objective forum and tribunal for the redress of Plaintiff's grievance against the International Union and Local 509. Consequently, the intra-union remedies provided by the International Union and Local 509 are, as a matter of law, adequate. Newgent vs. Modine Mfg., 495 F.2d 919 (7th Cir. 1974); Brookins vs. Chrysler, 381 F. Supp. 563 (E.D. Mich. 1974); Jenkins vs. General Motors, 364 F. Supp. 302 (DC Del. 1973); 76 Harvard Law Review, 983 1035 (March, 1973).

6. The Public Review Board lacked the power to restore Plaintiff to his job. However, such power is not necessarily required for an adequate remedy. The powers of the Public Review

Board are functionally adequate within the requirements of the instant case.

7. Exhaustion of the intra-union remedies provided by the International Union and Local 509 would not have been futile for the Plaintiff because there was not a preordained negative result.[1]

8. Because Plaintiff has failed to initiate, let alone exhaust, the intra-union remedies provided by the International Union and Local 509, the parties have agreed and the Court finds that the issue of the Union's breach of its duty of fair representation and the issue of whether just cause existed for Plaintiff's discharge by the employer are both rendered moot and must be dismissed. Plaintiff's failure to exhaust the intra-union remedies bars him from proceeding further in this action. Buzzard vs. Local 1040, supra, Newgent vs. Modine Mfg. Co., supra. Accordingly, judgment must entered in favor of Defendants including the award of costs of suit.

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[1] The above Findings and Conclusions are not affected by any concept of burden of proof. Assuming arguendo that Defendants have the burden of proof to show the Plaintiff's failure to exhaust intra-union remedies, the adequacy of those remedies and the lack of futility of exhausting such remedies, the Defendants have met such a burden by the preponderance of evidence.

DATED: MAY 27, 1977

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

LEVY, KOSZDIN, GOLDSCHMID & SROLOFF

By _____
MATTHEW B. F. BIREN
LAWRENCE ROSENZWEIG
Attorneys for Defendant Unions

PARKER, MILLIKEN, CLARK & O'HARA

By _____
EVERETT F. MEINERS
KENNETH J. FLORENCE
Attorneys for Defendant ITT Gilfillan

PROOF OF SERVICE

I am a citizen of the United States, over the age of 18 years, residing or employed in the County of Los Angeles, and not a party to the within action; my business address is:

3550 Wilshire Boulevard, Suite 1020, Los Angeles, CA. 90010

On May 13, 1977, I served a true copy of the attached.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

on the Plaintiff in said action, by hand delivering a true copy thereof enclosed in a sealed envelope addressed as follows:

John McTernan, Esq.
Margolis, McTernan, Scope & Sacks
3600 Wilshire Boulevard, Suite 2200
Los Angeles, California 90010

Everett J. Meiners, Esq.
PARKER, MILLIKEN, CLARK & O'HARA
27th Floor-Security Pacific Plaza
333 South Hope Street
Los Angeles, California 90071

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on May 13, 1977 at Los Angeles, California.

Jay Tweed

JAY TWEED

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FFORD E. CLAYTON PLAINTIFF(S) VS GILFILLAN, et al DEFENDANT(S)	CASE NUMBER CV 76-0730-IH NOTICE OF ENTRY

TO THE ABOVE NAMED PARTIES AND TO THEIR ATTORNEY(S) OF RECORD:

You are hereby notified that JUDGMENT

_____ in the above entitled case was entered in the docket on MAY 31 1977.

You are also notified that if this case was tried and you introduced exhibits into evidence, they must be claimed at this office after the expiration of thirty days from the receipt of this notice. (After sixty days in cases in which the United States, its officers or agencies were parties) Unless they are claimed within thirty days after the expiration of the above period, they will be destroyed pursuant to Local Rule 20(a). If an appeal is taken they will, of course, be held until the Appellate Court finally determines the matter. Exhibits which are attached to a pleading will not be destroyed but will remain as a permanent record in the case file.

(over)

CERTIFICATE OF MAILING

I, Edward M. Kritzman, Clerk, United States District Court, Central District of California, and not a party to the within action, hereby certify that on MAY 31 1977, 19____, I served a true copy of this notice of entry on the parties in the within action by depositing true copies thereof, enclosed in sealed envelopes, in the United States Mail in the United States Post Office mail box at Los Angeles, California, addressed as follows:

LEVY, KOSZDIN
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CLARL & O'HARA
Security Pacific Plaza 27th Fl.
333 So. Hope St.
LA, CA. 90071

EDWARD M. KRITZMAN, CLERK

By Maru Zeledon
Deputy Clerk
MARU ZELEDON

NOTICE

IN ACTIONS ARISING UNDER THE ECONOMIC STABILIZATION ACT, THE EMERGENCY PETROLEUM ALLOCATION ACT, AND THE ENERGY POLICY AND CONSERVATION ACT, NOTICES OF APPEAL TAKEN FROM THIS JUDGMENT MUST BE FILED IN THE TEMPORARY EMERGENCY COURT OF APPEALS IN ACCORDANCE WITH THE RULES OF PROCEDURE OF THAT COURT.